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No. 84-86

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

Scripps-Howard Broadcasting Company,
Eric Braun, and Larry Schock,

Petitioners

v.

Lester J. Barber and Janet E. Barber,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Constitution requires that this Court undertake an independent review of the record and reinstate summary judgment in a defamation action when the state appellate court overruled the grant of summary judgment on the ground that genuine issues as to material fact remained.

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Respondents, Lester J. Barber and Janet E. Barber, respectfully pray that a writ of certiorari to review the judgment and order of the Supreme Court of Ohio entered in this defamation action on April 18, 1984 be denied.

STATEMENT OF THE CASE

This case centers on an abandoned 10-foot rowboat which was recovered by the Lexington Township Volunteer Fire Department in July, 1978. Upon finding the boat overturned in

Berlin Reservoir, the Lexington volunteers proceeded to drag the reservoir in search of a body. None was found. Police Chief Paul Kelly transmitted the boat's registration numbers to the statewide LEADS computer in an attempt to identify the boat's owner.

Subsequently, Lester Barber, the volunteer fire chief of Lexington Township, contacted the Coast Guard and the Army Corp of Engineers and requested their assistance in identifying the owner of the boat. All efforts failed, so the boat was stored first in Mr. Barber's backyard, then at the fire department garage and eventually back in Mr. Barber's yard where it was found on February 10, 1982.

The recovery of the boat by Stark County Sheriff's deputies, through the use of an unnecessary search warrant was reported on WEWS TV's 11:00 p.m. Eyewitness News. Viewers of the broadcast were informed that the top story of the day in all of northeast Ohio was that "a police and fire chief in Stark County appear

to be in lots of hot water." The news story that is the subject of this lawsuit was then broadcast. (J.A. 7a).

As of this date, Mr. Barber has been neither arrested nor indicted. In fact, additional information has not even been taken to the Stark County Prosecutor or the Grand Jury.

WEWS TV has never cleared Mr. Barber's reputation. Even though Schock, the reporter of the story, claims to have suggested a follow-up story to WEWS TV, his supervisors "were not interested in covering the story any further." (Deposition of Schock at 45).

ARGUMENT AGAINST GRANTING CERTIORARI

The desperation of the Petitioners' cause is evidenced by the wholly inaccurate suggestion that Ohio Appellate Courts have "resolved" to penalize Ohio news organizations "at every opportunity in the most frivolous of defamation suits". (Petition at 3, n. 1).

To the contrary, the Appellate Courts of Ohio have erected substantial barriers for any public official to maintain a libel action against a media defendant, and have rigidly followed this Court's guidelines with respect to reviewing constitutionally protected First Amendment rights of news organizations.

The Ohio Rules governing the decisions of the lower courts in this case are set forth in Dupler v. Mansfield Journal, 64 Ohio St. 2d 116 (1980), cert. denied 452 U.S.962 and Bukky v. Painesville Telegraph

& Lake Geauga Printing Company, 68 Ohio St. 2d 45 (1981). They hold as follows:

> In order to withstand Defendant's Motion for Summary Judgment in a libel action brought by a public official, the Plaintiff must produce evidence sufficient to raise a genuine issue of material fact from which a reasonable jury could find actual malice with convincing clarity.

Bukky, syllabus.

This rule balances the first amendment principles of free press, the seventh amendment rights to a jury trial, and Rule 56(C) of the Ohio Rules of Civil Procedure governing the grant of summary judgment.

This impediment to maintaining a libel action is so severe, that the Chief Justice of the Ohio Supreme Court was forced to dissent in Bukky:

> With one judicial body blow, the Court today effectively eliminates, as a practical remedy, the ability of any public official or public figure to prosecute a successful defamation action. Since I believe that we should balance our concern for an uninhibited vigorous free

> press with a genuine awareness of a defamation plaintiff's legitimate interest in redressing wrongful injury, I respectfully dissent.

Bukky at 48, (Celebrezze, C.J. dissenting). The Petitioners exercise a rare form of legal gymnastics in suggesting that the Ohio Courts have failed to follow the decision of this Court in Bose Corp. v. Consumers Union, 104 S.Ct. 1949 (1984). It is apparent from the opinion of the Appellate Court that it observed and carried out its duty of an independent review of the record as required.

The Trial Court entered a summary judgment for WEWS TV upon its finding that the news report was not factually inaccurate and Petitioners were, therefore, entitled to judgment as a matter of law. In exercising its independent appellate review, the Stark County Court of Appeals was unable to rule that the record was devoid of genuine issues of fact as to the factual accuracy of the newscast: "Based on the record before

us, we find serious questions do exist whether the elements comprising the broadcast were true or false at the time of the broadcast." (J.A. 10a). Because of the Appeals Court's finding, summary judgment was inappropriate and properly overruled.

The existence of genuine issues of fact as to actual malice was never discussed by the Trial Court since it found that the newscast was not inaccurate, and therefore not defamatory. Nevertheless, the Court of Appeals properly dealt with the issue of actual malice by stating, "(j)urors acting reasonably could find the accusation to be false and could further find that the evidence shows with convincing clarity that it was falsely made with actual malice." (J.A. 15a). This holding reflects the Court's correct application of the standard of review set forth in Dupler and Bukky, supra.

The remedy of summary judgment is so drastic that it should be utilized with great

caution and only in those cases where the justice of its application is unusually clear. Even in defamation cases summary judgment is proper only if there exists no genuine issue as to any material fact. Clark v. American Broadcasting Companies, Inc., 684 F.2d 1208 (6th Cir. 1982) (emphasis added). Here, a total review of the record reveals that chief Barber did seek assistance in identifying the owner of the missing boat (Affidavit of Barber at 11); that Barber maintained the boat for three years in a manner wholly unsecretive, (Barber Deposition at 18) which the reporter Schock even acknowledged had been told to him by the Chief (Schock Deposition at 36); forcing the Court to conclude:

> Common experience and logic tells us that an individual desiring to hide a piece of property the size of a boat does not store it in a public building and outside on his own property for an uninterrupted period of three and one-half years.

(J.A. 11a).

In reviewing the entirety of the record, the Appellate Court also had before it the affidavit of Janet Barber and deposition of reporter Schock, in which a confrontation between the two of them months before the incident here is documented, which resulted in the filing of a complaint to defendant Schock's employer (Affidavit of Janet Barber).

The Petitioner, a large television station in one of America's largest television markets, suggests that the volunteer fire chief of rural Lexington Township is "harassing" them with this litigation. To the contrary, a total review of the record reveals that WEWS TV was doing at least one story per week about the Sheriff of Stark County or his office (Schock Deposition at 16); so many stories, that reporter Schock could not even guess at the number of times he had interviewed the Sheriff (Schock Deposition at 16). This is not a case where Petitioners were "watchdogs" of the public so much as they served as

"pet dog" of a single elected office holder who chose to obtain and execute a search warrant that resulted in great publicity, but not an arrest, and not even so much as a presentation of the evidence to the grand jury. Curiously, WEWS TV "was not interested" in carrying a subsequent story to even clarify the event (Schock Deposition at 45).

Certainly, the threat of being put to the defense of a lawsuit may be chilling to the exercise of First Amendment freedoms. Washington Post Company v. Keogh, 365 F.2d 965 (D.C. Cir. 1966), cert. denied 385 U.S. 1011 (1967) and while Petitioners assert this chilling effect as reason sufficient for the grant of their Petition, Respondents rely on the common sense approach of Chief Justice Burger in Hutchinson v. Proxmire, 443 U.S. 111 (1979):

> We are constained to express some doubt about the so-called "rule". The proof of "actual malice" calls a defendant's state of mind into question, New York Times v. Sullivan, 376 U.S. 254 (1964) and does not

> readily lend itself to summary disposition.

Hutchinson, 443 U.S. at 153 (1979). State of mind should generally be a jury issue. Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962).

Principles followed by the Federal Courts in granting summary judgment* have been adopted by the Ohio Courts as their standard of review for motions for summary judgment; namely, that inferences to be drawn from the underlying facts contained in the record must be viewed in the light most favorable to the party opposing the motion and if when so

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*Nader v. DeToledano, 408 A.2d 31 (D.C. 1979), cert. denied 444 U.S. 1078 (1980); Schultz v. Newsweek, Inc., 668 F.2d 911 (6th Cir. 1982); Yiamouyiannis v. Consumers Union, 619 F.2d 932 (2d Cir.) cert. denied 449 U.S. 839 (1980).

viewed reasonable minds can come to differing conclusions, the motion must be overruled. Williams v. Church, 37 Ohio St. 2d 150 (1974). As here, where a genuine issue of fact exists and where competing inferences may be drawn from undisputed underlying evidence, or when facts present are uncertain or indefinite, the Court must deny a Motion for Summary Judgment.

The issue presented to this Court by Petitioners has been resolved by the Ohio Supreme Court both in Dupler and Bukky, supra. Therefore, the Petition for Writ of Certiorari must be denied.

Respectfully submitted,

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